United States Courts
Southern District of Texas
ENTERED
DEC 22 2005
Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STROMAN REALTY INC,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-05-01203
	§	
ELAINE RICHARDSON,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

I. INTRODUCTION

Before the Court is a Rule 12(b)(6) motion to dismiss for failure to state a cause of action and lack of personal jurisdiction filed by the defendant, Elaine Richardson, in the capacity as the Commissioner of the Department of Real Estate for the State of Arizona ("Commissioner"). Fed. R. Civ. Pro. Rule 12(b)(6).The plaintiff, Stroman Realty Incorporated ("Stroman"), filed a memorandum opposing the Commissioner's motion to dismiss. The Commissioner then filed a motion for summary judgment. Thereafter, Stroman filed a memorandum opposing the Commissioner's motion for summary judgment. After considering the motions, the pleadings, the responses, and the applicable law this Court determines that the Commissioner's motion to dismiss should be granted.

II. FACTUAL HISTORY

The Commissioner of Arizona has received numerous complaints from Arizona residents about the timeshare resale business practices of Stroman Realty. Some of the residents' complaints allege that they paid Stroman $489 for advertising fees and entered into listing agreements with Stroman. However, Stroman failed to provide prospects or examples of advertisements for their particular timeshares. Some complained that they were not able to contact either Stroman or its agents. Some Arizona brokers also complained about Stroman's business practices. In response to these complaints, the Commissioner issued to Stroman a Cease and Desist Order and Notice of Right to Request a Hearing, on January 13, 2000.

The notice stated that Stroman and its agents conducted timeshare resale activities without obtaining Arizona real estate licenses as required by state law. Stroman did not respond and did not exercise its right to seek an appeal or a judicial review of the order in Arizona state courts. The Commissioner directed that Stroman cease the resale activities and obtain the requisite licenses to comply with Arizona State licensing laws and regulations. The order became final after thirty days when no response was received from Stroman. Stroman filed its original complaint in April 8, 2005, seeking injunctive relief. On June 15, 2005, Stroman amended its complaint against the Commissioner seeking declaratory relief. In its amended complaint, Stroman alleges that Arizona's licensing requirements violates the Commerce Clause of the Constitution. The Commissioner then filed its motion to dismiss and motion for summary judgment on all claims.

III. CONTENTION OF THE PARTIES

In its motion, the Commissioner advances three contentions: (1) Stroman's suit should be dismissed because its claim is barred by res judicata since Stroman failed to exhaust its administrative remedies or seek judicial review of the Commissioner's order; (2) a federal court in Texas does not have personal jurisdiction over the Commissioner; and, (3) venue is proper in Arizona, not Texas. Stroman argues that (1) this court does have personal jurisdiction over the Commissioner; (2) venue is proper in Texas; (3) Arizona lacked jurisdiction to enter a final administrative order; (4) claim preclusion is not applicable to Arizona's un-reviewed administrative order; (5) it is not required to exhaust administrative remedies as a prerequisite to suit under 42 U.S.C. § 1983; (6) Arizona's administrative forum, was inadequate to give Stroman relief; and (7) the cease and desist order has no effect on Stroman's claim for prospective relief.

IV. STANDARD OF REVIEW

Standard of dismissal under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of an action on the grounds that a plaintiff has failed to state a cognizable claim upon which relief may be granted. *See Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). The Rule tests the legal sufficiency of the claims advanced in the complaint. *Grisham v. United States,* 103 F.3d 24, 25-26 (5th Cir. 1997). Therefore, a court will grant a 12(b)(6) motion to dismiss only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss under 12(b)(6), a court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations in the pleader's favor. *Oppenheimer v. Prudential Sec.,*

Inc., 94 F.3d 189, 194 (5th Cir. 1996). However, "conclusory allegations and unwarranted deductions of fact are not admitted as true." *F.D.I.C. v. Harrington*, 844 F. Supp. 300, 302 (N.D. Tex. 1994)(quoting, *Ass'n Builders, Inc. v. Ala. Power Co.*, 505 F. 2d 97, 100 (5th Cir. 1974)). Thus, a court's treatment of a motion to dismiss is limited to the four corners of the complaint.

To survive a 12(b)(6) motion to dismiss, a plaintiff must plead specific facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *see also Henrise*, 94 F. Supp.2d at 769.

V. ANALYSIS

The Court is of the opinion that the issues set forth in the parties' motions are resolved by the doctrine of abstention and collateral estoppel. The issue of personal jurisdiction is not addressed because the Court is of the view that the abstention doctrine applies. The Court is also of the opinion that Stroman's suit is merely a collateral attack against an administrative order. Because this suit arises as a result of the Commissioner's order, this Court must give full faith and credit to that order.

Burford Abstention

The Court holds that the Burford abstention doctrine applies. The Burford abstention doctrine "defers to a state's overriding interest in the matters sub judice and, concomitantly, to the superior competence of the state's courts to adjudicate such matters. . . where a paramount state interest is apparent." *BT Investment Managers, Inc. v. Lewis,* 559 F.2d 950, 955 (5th Cir. 1977). The Supreme Court spoke to this doctrine in *Orleans Public Serv. Inc.* The Court stated:

> "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the . . . orders of state administrative agencies: . . . where the 'exercise of federal review of the question

> in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"

Orleans Public Serv. Inc. v Council of New Orleans, 491 U.S. 350, 361 (1989)(citing *Colorado River Water Conservation Dist. v. United Sates*, 424 U.S. 800, 813-814 (1976).

In the case at bar, Arizona has enacted a set of laws and regulations aimed at regulating the real estate industry within its boundaries and/or realtors who do business with its citizens. Citizens could seek redress concerning issues of misrepresentation or fraud on the part of realtors through the Commissioners of the Department of Real Estate. Hence, Arizona's licensing regulations became a matter of public interest and, therefore, the Commissioner was empowered to enforce these rules and regulations in behalf of its citizens. In Stroman's case, the Commissioner issued a cease and desist order against Stroman that detailed the procedures permitted by law to either contest the order or seek judicial review. Stroman had an opportunity to appear and defend against the charges. However, it did not. Stroman was also given adequate time to seek judicial review of the cease and desist order. Again, Stroman failed to take advantage of this opportunity. Hence, when Stroman failed to exhaust its administrative remedies, a final order was issued against Stroman and its agents. Five years after the order became final, Stroman brings this suit in federal court under the Civil Rights Act. However, Stroman has an adequate forum to address Arizona's laws. Thereafter, Court holds that federal review of the state's administrative orders will interfere and disrupt Arizona's efforts to regulate the real estate licensing requirements within its jurisdiction. This Court will not interfere.

Collateral Estoppel/Res Judicata

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,

the courts have not hesitated to apply res judicata to enforce repose." *Astoria Federal Savings and Loan Association v. Solimino*, 510 U.S. 104, 107 (1991)(quoting, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)). A court "should do so equally when the issue has been decided by an administrative agency, be it state or federal. *Id.* (citing, *University of Tennessee v. Elliot*, 478 U.S. 788, 798 (1986).

As earlier noted, Stroman had notice and an opportunity to dispute the changes made against it during an administrative hearing. Furthermore, if the outcome was unfavorable, it had an opportunity to seek judicial review of the decision in the state courts of Arizona. Stroman's suit against the Commissioner's final administrative order is nothing short of a collateral attack against a final order. The doctrine of collateral estoppel applies and the Court holds that this suit is barred irrespective of what it is called.

VI. CONCLUSION

In light of the discussion above, the Court hereby **GRANTS** the defendant's motion to dismiss. It is so ordered.

Signed this 22nd day of December, 2005

KENNETH M. HOYT
United States District Judge